

CANADA / JUDGMENT

Perimeter Transportation Ltd. (Re)

2010 BCCA 509

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 509 Perimeter Transportation Ltd. (Re)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Perimeter Transportation Ltd. (Re),

2010 BCCA 509

Date: 20101117

Docket: CA037606

Between:

Vancouver International Airport Authority

Appellant

(Applicant)

And

Century McMynn Leasing Partnership,

1019553 Alberta Ltd.,

GE Canada Equipment Financing G.P. and

General Electric Equipment Finance G.P.

Respondents

(Respondents)

Corrected Judgment: The Style of Cause was amended to read "Vancouver International Airport Authority" as appellant; para. 8 was also amended on December 9, 2010

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, October 27, 2009 (Perimeter Transportation Ltd. (Re), 2009 BCSC 1458,

Vancouver Registry, Docket B081758)

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Place and Date of Hearing:

Vancouver, British Columbia

October 1, 2010

Written Submissions Received:

November 1 & 2, 2010

Place and Date of Judgment:

Vancouver, British Columbia

November 17, 2010

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal raises two knotty questions - the first a technical one that is the subject of disagreement in the case-law, concerning the effect of s. 30(2) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 (the "PPSA") where the goods in question were leased rather than purchased; and the second, concerning the effect of the "release" of the goods by a trustee in bankruptcy to a creditor under the impression, perhaps mistaken, that the creditor was entitled to them. For reasons indexed as 2009 BCSC 1458, the chambers judge below resolved the first question in favour of the respondent GE Canada Equipment Financing G.P. ("GE"). Since the goods had been released to the respondent Century McMynn Leasing Partnership ("Century") at GE's request, she did not find it necessary to deal with the second question in depth. In my respectful view, the chambers judge reached the correct result, although my reasons for concluding that the appeal should therefore be dismissed are somewhat different from those of the chambers judge.

Factual Background

- [2] The facts that are relevant to the appeal may be briefly stated. This matter came to court on an application (made under s. 34(1) of the Bankruptcy and Insolvency Act, 1985, c. B-3 ("BIA")) for directions by The Bowra Group Inc. as the then trustee in bankruptcy of Perimeter Transportation Ltd. ("Perimeter"). Until it became bankrupt, Perimeter was in the business of providing bus transportation services to and from YVR Airport.
- [3] On April 4, 2008, Perimeter agreed to lease three "Prevost" brand buses from Century for a term of eight years. The lease contained options to purchase and the usual provisions entitling Century to terminate the lease in the event of a default by the lessee. For reasons that were not explained, Century did not file a financing statement in respect of the lease prior to Perimeter's bankruptcy.
- [4] In May 2008, Century negotiated a loan of \$4.3 million from GE, which was documented in an "Equipment Loan and Security Agreement" ("ELSA") dated May 23. In it, Century granted GE a security interest in the three buses and all proceeds therefrom, including from the leasing or rental of the buses. GE filed a financing statement in the Personal Property Registry as against Century in which it identified inter alia the three Prevost buses by serial number. As the chambers judge noted at para. 14 of her reasons, Perimeter was not a debtor under the ELSA and GE did not file a financing statement against it. (GE had previously lent money to Perimeter directly and had taken and filed notice of a general security agreement, but none of the parties in this proceeding relied on it, presumably because the loan was no longer outstanding.)
- [5] On November 26, 2008, Perimeter made an assignment in bankruptcy, prompting Century to file its financing statement in respect of the lease of the three buses the following day.
- [6] In December 2008, the facts that gave rise to the second issue on appeal occurred. The chambers judge described them as follows:

On December 17, 2008, the Trustee [then The Bowra Group Inc.] and GE corresponded by email about the Prevost Buses. GE confirmed the payout figures which Century's counsel had provided, and authorized the Trustee to release the Prevost Buses to Century on GE's behalf.

On December 17, 2008, the Trustee released the Prevost Buses to Century.

Mr. Mainella, a licensed trustee in bankruptcy for the Trustee, deposed that the Trustee released the Prevost Buses to Century on its understanding, having obtained legal advice, that the indebtedness of Century to GE was validly secured against the Prevost Buses. The Trustee now states that on further investigation, it appears that the indebtedness of Century to GE was not validly secured against the Buses.

Mr. McMynn, of Century, deposed that he was not aware of any such understanding by the Trustee. He deposed that the Prevost Buses were returned to Century unconditionally.

There is nothing in the email correspondence of December 16 and 17, 2008, to suggest that there were conditions on the release of the Prevost Buses to Century. [At paras. 18-22.]

[7] Century subsequently leased the three buses to other parties, "Cantrail" and "PCL", for terms of 88 months. The chambers judge continued:

Pursuant to the GE/Century 2008 ELSA, if Century is required to return the Prevost Buses or assign the Cantrail Lease and the PCL Lease to the Trustee, Century will be in default and GE will have remedies under the GE/Century 2008 ELSA and other collateral security. [At para. 25.]

The Trustee took the position that if Century was not entitled to the return of the buses, then it (the Trustee) was entitled to their return or to an amount equal to their value.

[8] At some point, Vancouver International Airport Authority took an assignment of this action from the Bowra Group Inc. pursuant to s. 38 of the BIA. I will use the term "Trustee" in these reasons to refer to whichever entity was entitled to pursue this action.

[9] As found by the chambers judge, both GE and Century were at all material times in the business of leasing buses.

PPSA Provisions

[10] At paras. 27-39 of her reasons, the chambers judge set out various sections of the PPSA, including the definitions of "collateral" and "security interest" in s. 1(1). For purposes of the appeal, however, we need only refer to ss. 12(2), 20(b)(i), 21 and 30(2). They provide as follows:

12(2) For the purposes of subsection (1) (b) and without limiting other rights, if any, which the debtor has in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

20 A security interest

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy

21 If the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is not effective against a judgment creditor under section 20 (a) or a trustee or liquidator under section 20 (b), the lessor or consignor is deemed, as against the lessee or consignee, as the case may be, to have suffered, immediately before the seizure of the leased or consigned goods or the date of the bankruptcy or winding-up order, damages in an amount equal to

(a) the value of the leased or consigned goods at the date of the seizure, bankruptcy or winding-up order, and

(b) the amount of loss other than that referred to in paragraph (a) that results from the termination of the lease or consignment.

30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created. [Emphasis added.]

[11] Section 30(2), dealing with sales and leases in the ordinary course, is the successor to a somewhat similar provision in the former Sale of Goods on Condition Act, S.B.C. 1979, c. 373, which applied to leases that contained options to purchase. The PPSA applies, however, to all "true" leases with terms in excess of one year. R.C.C. Cuming, Catherine Walsh and R.J. Wood in *Personal Property Security Law* (2005) describe the underlying policy and effect of s. 30(2) as follows:

The Act contains a priority rule that substantially affects the status of a perfected security interest in collateral in the form of goods. Any sale or lease of the collateral by the debtor in the ordinary course of business results in the security interest being cut off, in the case of a sale, and abridged to the extent of the lessee's interest in the case of a lease, unless the buyer or lessee knows that the sale or lease violates the terms of the security agreement.

The policy underlying the section is that persons who buy goods in the ordinary course of business should not be required to take measures to protect themselves against the risk that the goods they buy are subject to prior perfected or unperfected security interests given by sellers with whom they deal. A secured party who takes a security interest in goods of a debtor who is in the business of selling goods of that kind can expect that its security interest will be defeated by transactions with customers of the debtor. The Saskatchewan Court of Appeal [citing *Camco Inc. v. Frances Olsen Realty* (1979) Ltd. [1986] 6 W.W.R. 258] has taken the position that courts should give "a generally liberal interpretation to the phrase 'buyer of goods sold in the ordinary course of business of the seller', in order to carry out the purpose of the ordinary course buyer rule: to protect the buying public in cases where the secured party furnishes goods which are sold to the

public by the debtor in the regular course of the debtor's business. This comports with the underlying philosophy of the provision to protect the security interest so long as it does not interfere with the normal flow of commerce."

The priority rule protecting ordinary course buyers is a rule of law; its function does not depend on any implied right of sale given to the debtor in the security agreement or otherwise. [At 286-87; emphasis added.]

The authors also state in a footnote that s. 30(2) "does not mean that the lessee acquires ownership of the leased property. It means that the security interest cannot be asserted against the lessee so long as the lease is extant."

Three Cases

[12] Before turning to the chambers judge's reasons, it may be useful to review in some detail three cases to which counsel referred us on the first branch of this appeal. I will deal with them in chronological order. The first is *Car-Ant Investments Ltd. v. Peat Marwick Thorne Inc.* (1990), 84 Sask. R. 249 (Q.B.). A person who later became bankrupt (whom I will refer to as "B") financed the purchase of some trailers through one "Davlyn", which took title to the trailers directly from the dealer and then granted lease/option agreements to B. Davlyn failed to register notice of its security interests in the PPSA registry. After signing the leases with B, Davlyn granted chattel mortgages to GMAC on the trailers, which mortgages also contained an assignment of Davlyn's interest under the lease agreements. GMAC filed the required financing statements in the PPSA registry. Some time later, B became bankrupt.

[13] The Court ruled that Davlyn's security interest, not having been registered, was subordinated to that of the trustee in bankruptcy under the Saskatchewan counterpart to s. 20(b) of the British Columbia PPSA. The "real issue", however, was whether the trustee could also subordinate GMAC's security interest in the trailers by relying on s. 30(1) of Saskatchewan's PPSA (S.S. 1979-80, c. P-6.1), the counterpart to s. 30(2) of the British Columbia legislation. Halvorson J. ruled that "Davlyn was in the finance business, not the trailer business", with the result that the provision had no application. However, the Court went on to state in obiter dicta:

... The bankrupt bought the trailers from a dealer. To pay for the acquisitions the bankrupt obtained financing from Davlyn. The circumstance of Davlyn securing itself by the device of lease option agreements did not convert Davlyn's business to that of leasing trailers.

The application of s. 30(1) to the situation here is limited to protecting the bankrupt from security interests against the trailers given by the dealer from whom the bankrupt actually bought the trailers. Moreover, s. 30(1) cannot possibly apply because the security interest from which the bankrupt seeks protection under that section is the very interest created by the bankrupt in not paying for the trailers. As importantly, the GMAC interest did not exist at the time the bankrupt acquired the trailers.

During the hearing of this appeal the trustee challenged the priority of the GMAC security interests on a further ground. The argument is that GMAC must assert its claims through Davlyn which granted the chattel mortgages and not through the bankrupt which is not a party to the mortgages. Consequently, because the Davlyn interests are subordinate to the trustee by s. 20(1)(d), so too are the GMAC interests.

This submission is fundamentally flawed. The bankrupt created the debt positions by not paying in full for the trailers. The debts were owned initially by Davlyn under the lease options and then by GMAC under the chattel mortgages. GMAC perfected its interests in the debts. The fact Davlyn did not is irrelevant to GMAC.

Related to this submission is the trustee's additional argument that double perfection was necessary to maintain the priority of the GMAC security interests. That is, both the GMAC and the Davlyn security interests had to be perfected. Cited in support of this proposition are comments at p. 180 in a handbook on the Saskatchewan Personal Property Security Act, Cuming and Wood. There the authors discuss security interests in chattel paper and suggest instances where double perfection may be required.

These comments do not assist the trustee. Under its chattel mortgages, GMAC acquired security interests in the trailers as well as in the debt obligations of the bankrupt under the lease options. Both of these interests were perfected by GMAC upon the filing of the financial statements. Had GMAC acquired only a security interest in the debt obligations, then a second registration would have been necessary to perfect security interests in the trailers as well.

I find that the security interests of GMAC in the trailers have priority over the interests of the trustee. [At paras. 14-20; emphasis added.]

[14] In *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)* [1994] A.J. No. 558, (1994) 9 W.W.R. 680 (Q.B.), the Court reached a different result than that indicated by the Car-Ant obiter. In *Morris*, the bankrupt (whom I will refer to as "B") leased a motor vehicle from Morris, a car dealership. Morris failed to register a financing statement in respect of the lease as required. A short time later, Morris granted a chattel mortgage to the Bank of Montreal against the leased vehicle as security for an outstanding loan. The Bank registered its security interest on August 13, 1992. B became bankrupt several months later and the Bank immediately demanded that the trustee deliver the vehicle to it in recognition of its secured claim.

[15] The Court, per Dea J., found that although most of Morris' leasing business was indirect, it did regularly engage in leasing vehicles to its customers. As well, the Court found that since Morris' security interest was unperfected at the date of bankruptcy, it was ineffective against the trustee. (Para. 22.) The more difficult question again concerned the effectiveness of the Bank's security as against the trustee. The Bank naturally argued that Car-Ant had properly interpreted the "ordinary course of business" provision and that its interest should prevail over the trustee.

[16] Dea J. began by noting that the ratio of Car-Ant was that Davlyn had not been in the trailer business and therefore s. 30(1) of the Saskatchewan PPSA had had no application. He then continued:

But the Court [in Car-Ant] goes on to say "Moreover Section 30(1) (the equivalent of Section 30(2) of the Alberta Act) cannot possibly apply because the security interest from which the bankrupt seeks protection under that section is the very interest created by the bankrupt in not paying for the trailers." This counsel argues is incorrect. He argues that the bankrupt sought to apply Section 30(1) against the contract between Davlyn and GMAC which is not the interest created by the bankrupt by not paying for the trailers. It is the interest created by Davlyn by borrowing from GMAC. In other words Section 30(1) applies to Davlyn's financial arrangements, not the bankrupt's. The Court then says "as importantly, the GMAC interest did not exist at the time the bankrupt acquired the trailers". That is true. Because GMAC acquired its interest only after Davlyn took the leases, GMAC's interest is subject to those very leases "warts and all". Those leases are very frail because of lack of registration of a financing statement. It could be found unenforceable against a trustee in bankruptcy in the event that the purchaser became bankrupt which, of course, it did.

Counsel continues and points out that at page 4, paragraph 2 Halvorsen J. again says:

"The bankrupt created the debt positions by not paying in full for the trailers". That is true of the lease options. It is not true of the chattel mortgages. Davlyn's financing of its affairs is of no concern to the bankrupt. In the same paragraph, the Court goes on to say that GMAC perfected its interest in the debts. That may be, but what is really relevant is that GMAC did not perfect its interest in the leased trailers. That it could not do, for the simple reasons that Davlyn did not have a properly secured interest to give to GMAC.

With respect I am persuaded by counsel's argument. In my view, the Car-Ant case cannot be relied upon for the proposition advanced by the Bank.

It then follows that the argument of the Bank and Morris that "takes free" in Section 30(2) of the P.P.S.A. (supra) has the meaning described in Car-Ant (supra) cannot succeed nor can the "nemo dat" argument. With respect to the Bank's claim on its chattel mortgage it is clear that as between the Bank and the Trustee that Section 30(2) is a complete answer. The lessee takes the vehicle free from any security interest the Bank may have. [At paras. 33-6; emphasis added.]

[17] The Court also found that the security granted by Morris to the Bank pursuant to s. 427 of the Bank Act had attached only while the collateral was "stored at [Morris'] place or places of business". Thus once Morris had parted with physical possession of the vehicle in question, the Court said, the Bank retained "only whatever rights Morris had against [B]". In the result, the trustee took the vehicle free of any security interest in the goods given by Morris to the Bank by virtue of s. 30(2), and the claims of Morris itself were ineffective as against the trustee by virtue of s. 20(1)(b), Alberta's counterpart of s. 20(b)(i) of the British Columbia PPSA.

- [18] As the chambers judge below noted at paras. 63-4, an appeal was taken from Dea J.'s decision. The Court of Appeal endorsed his finding that Morris' interest was not effective against the trustee. However, with respect to the Bank's appeal, the Court directed that because new case-law had arisen subsequent to the appeal hearing, the matter should be re-argued before a new panel of the Court. (See [1996] A.J. No. 392, [1996] 7 W.W.R. 332 (C.A.).) Evidently, the second hearing never took place.
- [19] The third case of note did not involve s. 30, but dealt with the effect of an unperfected security interest arising under a lease vis-à-vis the trustee in bankruptcy of the lessee. In *Re Giffen* [1998] 1 S.C.R. 91, a lessor ("TLC") had leased a car to B.C. Telephone Co., which in turn (sub-)leased it to one of its employees, "B". The sublease had a term of more than one year. When B became bankrupt on October 12, 1993, neither B.C. Telephone Co. (which was not found to be in the business of leasing goods) nor TLC had registered financing statements under the PPSA in respect of their security interests. TLC seized and sold the car with the trustee's consent and the proceeds of sale were placed in trust. The trustee obtained an order in the Supreme Court of British Columbia, per Hood J., that it was entitled to the proceeds by virtue of s. 20(b)(i) of the PPSA, but this court reversed that order on the bases that under s. 71(2) of the BIA, it was the "property of the bankrupt" that vested in the trustee, that the lessee did not have a proprietary interest in the car, and that allowing the trustee a greater claim to the vehicle than the bankrupt had would "overlook fundamental concepts of bankruptcy law".
- [20] The Supreme Court of Canada allowed the trustee's appeal and restored Hood J.'s order. Iacobucci J. for the Court stated that the primary issue on the appeal was whether s. 20(b)(i) of the PPSA could extinguish the lessor's (i.e., TLC's) right to the car in favour of the trustee's interest, or whether the operation of s. 20(b)(i) was "limited by certain provisions of the BIA". The issue could be resolved, he said, by a "normal reading of the relevant provisions of both the PPSA and BIA, buttressed by the policy considerations supporting these provisions." (Para. 24.) The Court of Appeal was found to have erred in focusing on the locus of title in the car and in holding that the lessor's common law ownership interests prevailed despite the clear meaning of s. 20(b)(i). It had not recognized that in enacting the PPSA, the Legislature had "set aside the traditional concepts of title and ownership to a certain extent." The Supreme Court quoted with approval a passage from *International Harvester Credit Corp. of Canada v. Bell's Dairy Ltd.* (1986) 30 D.L.R. (4th) 387, 34 B.L.R. 76 (Sask. C.A.), in which it was recognized that the PPSA regime "does not turn on title to the collateral":

There is nothing in the language of the section [s. 20 of the Saskatchewan and British Columbia PPSAs], or its relationship with other sections, or indeed in the overall scheme of the Act to suggest, for example, that an unperfected security interest, because it is rooted in and attached to the title of particular goods in the possession of a debtor, should be treated as superior to the more generally derived and broadly attached interest which an execution creditor comes to have in a debtor's goods. Indeed, the very opposite is suggested not only by the language of the section, but by the overall thrust of the Act. [At 396.]

Thus in Iacobucci J.'s analysis, the dispute could not properly be resolved by determining who had title to the car, because the dispute was "one of priority to the car and not ownership in it."

[21] The Court noted the definition of "security interest" in the Act, which expressly includes the interest of a lessor under a lease with a term of more than one year. Thus, Iacobucci J. said, "[t]he lessor's interest in the car is the reservation of title in the car; this interest, created by the lease agreement, falls within the ambit of the PPSA." Until it was perfected, that interest remained vulnerable to third parties obtaining an interest in the car through the lessee, including a trustee in bankruptcy. Upon the lessee's assignment into bankruptcy, her "property", including her right to use and possess the car, vested in the trustee under s. 71(2) of the BIA. (See *Paccar Financial Services Ltd. v. Sinco Trucking Ltd.* (1989) 57 D.L.R. (4th) 438, 73 C.B.R. (N.S.) 28 (Sask. C.A.).) By virtue of s. 12(2) of the PPSA, this was also a "proprietary" interest for purposes of both the PPSA and BIA. Again, Iacobucci J. quoted a passage from *International Harvester*, supra:

a trustee in bankruptcy, upon whom there devolves a chattel in the possession of the bankrupt under a commercial lease for a term exceeding a year, succeeds to the contractual or "possessory" interest of the bankrupt in that chattel, as well as to the bankrupt's statutory or "proprietary" interest therein as conferred upon the debtor by s. 12 of the Act. ... [Quoted at para. 36 of Giffin.]

[22] Turning to s. 20(b)(i) of the PPSA, Iacobucci J. noted that a person with an interest "rooted in title to property" in the possession of another is vulnerable if the interest is not perfected under the PPSA. In his words:

... Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral. However, public disclosure of the security interest does not seem to be required to protect a trustee who is not in the position of an innocent third party; rather, the trustee succeeds to the interests of the bankrupt. In one authority's opinion, trustees are given the capacity to defeat unperfected security interests because of the "representative capacity of the trustee and the effect of bankruptcy on the enforcement rights of unsecured creditors" (R. C. C. Cuming, "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17, at pp. 27-28).

Prior to a bankruptcy, unsecured creditors can make claims against the debtor through provincial judgment enforcement measures. Successful claims will rank prior to unperfected security interests pursuant to s. 20. Once a bankruptcy occurs, however, all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims. Cuming describes the purpose of s. 20(b)(i) (at p. 29):

In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the BCPPSA to attack the unperfected security interest.

The purpose behind granting a trustee in bankruptcy the power to defeat unperfected security interests was recognized by the Saskatchewan Court of Appeal in *International Harvester* (at p. 206):

Indeed, the fact that a trustee in bankruptcy is a representative of creditors serves to shed light on more than one aspect of the issue. It explains -- or at least assists in the explanation of -- why a trustee in bankruptcy is included in s. 20, as well as why a trustee is not necessarily confined to the interest of the bankrupt.

The Saskatchewan Court of Appeal again acknowledged the representative role of the trustee in bankruptcy in *Paccar Financial Services*, which also involved a priority contest between a trustee and the unperfected security interest of a lessor. The court stated that the trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests. It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest" (p. 490).

The Court of Appeal [of British Columbia] erred, in my view, in not recognizing that the purpose of s. 20(b)(i) is, at least in part, to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor. [At paras. 38-42; emphasis added.]

[23] The Court noted the express statement in s. 20(b)(i) that a security interest in collateral is "not effective against a trustee in bankruptcy" if the interest was unperfected as at the date of bankruptcy, i.e., that the lessor's interest in this instance was ineffective against the trustee. (Para. 43.) The provision did not grant title or any other proprietary interest to the trustee; rather, it prevented the lessor from exercising rights against the trustee" - although "[a]dmittedly, the effect of s. 20(b)(i), on the present facts, is that the trustee ends up with full rights to the car when the bankrupt had only a right of use and possession." (Para. 44.) The Court endorsed the view taken in *International Harvester* to the effect that:

Provincial legislatures, faced with a policy choice involving the competing interests of the true owner and those of third parties dealing with the ostensible owner, have decided that the true owner must forfeit title, when faced with a competing interest, if she failed to register her interest as required. The court [in *International Harvester*] also noted that true leases were not regulated by the personal property regimes until recently. Thus, "as a general rule the common law did not allow the lessor's title to leased goods to be defeated through some dealing of the lessee. However, the Personal Property Security Act has effected far-reaching changes to the law". [Giffen, para. 52; emphasis added.]

[24] The PPSA, then, supplants the common law rule of *nemo dat quod non habet* in priority contests between a trustee in bankruptcy and the holder of an unperfected security interest, as described in s. 20(b)(i). It was, the Court stated, a "policy choice of the Legislature that an

unsecured creditor's position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor." (Para. 54.) In the result, the trustee in bankruptcy in Giffen was found to be entitled to the proceeds of sale of the car, and could pass title to the car to a purchaser as a result of the operation of both s. 20(b)(i) of the PPSA and s. 81(2) of the BIA. (Paras. 57-9.)

The Chambers Judge's Reasons

[25] The chambers judge reviewed the foregoing cases in the context of ss. 20(b)(i) and 30(2) of the PPSA and began her analysis at para. 65 by asking the question "Does GE have priority in the Prevost Buses over the Trustee?" Faced with the conflicting reasoning in Car-Ant and David Morris, neither of which was binding on her, she preferred the obiter in Car-Ant to the reasoning of the lower court in David Morris. She reasoned as follows:

The court in North Sky Trading considered that Car-Ant was wrongly decided. It stated that the secured creditor in Car-Ant, GMAC, did not, and could not, perfect its interest in the trailers because at the time Davlyn, the lessor, entered into the security agreement with GMAC, Davlyn did not have a properly secured interest to give to GMAC. Dea J. concluded that GMAC therefore perfected its interest in the debts arising under the lease, but not in the trailers which were the subject of the lease.

The flaw in this argument is that the issue of whether or not Davlyn's security was perfected arises only on the bankruptcy of the debtor. At the time it entered into the security agreement with GMAC, Davlyn held title to the trailers. It was entitled to grant a security interest in the trailers to another. The validity of GMAC's perfected security interest should not be dependent on the fact that Davlyn did not have a perfected security interest at the time it granted GMAC an interest in the trailers.

From a policy perspective, the perfected security interests of creditors like GMAC and GE should not be subordinate to a trustee in bankruptcy merely because at the time the secured creditor entered into the security agreement, the debtor's interest in the collateral was unperfected. Section 20(b)(i) addresses the effectiveness of collateral which is unperfected at the date of bankruptcy, not at the date of the grant of an interest in the collateral. For example, Century could have perfected its security interest in the Prevost Buses by registering the Century/Perimeter Prevost Bus Lease against Perimeter in the PPR on the day before Perimeter's bankruptcy, even if it had done so after it entered into the GE/Century 2008 ELSA. In these circumstances, s. 20(b)(i) would not have given the trustee priority over the secured creditor. The reasoning in North Sky Trading undermines the reasonable expectations of secured creditors registering in compliance with the PPSA and is inconsistent with business efficacy.

GE took a security interest in the Prevost Buses under the GE/Century 2008 ELSA and registered a financing statement in accordance with s. 25 listing the Prevost Buses by serial number. Its interest was not, as the Trustee contends, solely in the debt obligations under the Century/Perimeter Prevost Bus Lease.

Section 30(2) therefore does not defeat the perfected interest of GE in the Prevost Buses arising from the GE/Century 2008 ELSA registered against Century in the PPR prior to the bankruptcy. [At paras. 74-78; emphasis by underlining added.]

[26] Accordingly, the chambers judge ordered that GE's interests in the buses "stand in priority to any interest of the Trustee in the buses." It was not necessary to deal with the effect of the Trustee's release of the buses, at GE's request, to Century.

On Appeal

[27] In this court, the argument of the Trustee is a simple one, at least on the first issue: it submits that the chambers judge's conclusion runs contrary to the plain wording of s. 30(2) of the Act and the policy underlying that section - ensuring that persons who buy or lease goods from a dealer in the ordinary course of the dealer's business should not be required to search the registry to protect against the risk of security interests given by the dealer. This is consistent with the reasonable expectations of buyers and lessees who do business with dealers in the ordinary course, and it appears the Legislature intended that these expectations should prevail over the expectations of secured creditors - even though such creditors may have perfected their security interests. The Trustee urges us to adopt the reasoning of Dea J. in *David Morris* and to conclude that on the bankruptcy of *Perimeter*, all its "property" vested in the Trustee by virtue of s. 71 of the BIA; that the interest of Century is vulnerable to the Trustee's interest by virtue of s. 20(b)(i); that GE's security interest comes within the ambit of s. 30(2); and that British Columbia courts have interpreted s. 30(2) as "eliminating" security interests "granted by a vendor/lessor if the sale is in the ordinary course of business." I must note, with respect, that the two cases cited by the Trustee in support of this proposition - *Willi v. Don Shearer Ltd.* (B.C.C.A., Kamloops Registry Docket No. CA015094, dated September 29, 1993) and *Ensign Pacific Lease Ltd. v. Lumar Auto Sales et al.*, (S.C.B.C., Vancouver Registry Docket No. C974469, dated December 9, 1997) - do not support it: *Willi* did not involve a lease but a sale; and in *Ensign*, s. 30(2) was found not to be applicable because the seller had not granted the security interest in question.

[28] I agree with the Trustee that s. 30(2) is (as in *Ensign*) inapplicable to the lease granted by *Perimeter* to Century, and that if the only issue on appeal were the status of Century's interest, s. 20(b)(i) would apply to make it "ineffective" against the Trustee. I also agree with the respondents, however, that on its plain wording, s. 30(2) applies to the security interest granted by Century to GE: it is an interest in goods given by the lessor (Century) and Century leased the goods to the lessee (*Perimeter*) in the ordinary course of Century's business. As I understand it, GE does not dispute this is the case. Assuming s. 30(2) applies, then, what is its effect? What exactly does the Trustee "take" free of the security interests described in the provision?

[29] I have already referred to the text by Cuming, Walsh and Wood in which they describe s. 30(2) as 'cutting off' the security interest described in that provision in the case of a sale, and 'abridging [the security interest] to the extent of the lessee's interest' in the case of a lease. To repeat the footnote at page 286 of their book:

This does not mean that the lessee acquires ownership of the leased property. It means that the security interest cannot be asserted against the lessee so long as the lease is extant. [Emphasis added.]

Elsewhere, the authors explain the effect of s. 30(2):

there is an important difference between the position of a buyer and a lessee. A priority rule may provide that both a buyer and a lessee "take free from" a security interest. In the context of a buyer, this means that the security interest is cut off with the result that the buyer acquires the debtor-seller's ownership interest in the collateral free from the security interest. However, in the context of a lease, this only means that the security interest cannot be asserted against the lessee. The security interest is not cut off; it remains effective with respect to the reversionary interest of the debtor-lessor. [At 279.]

They cite the "more precise" wording of s. 28(2) of the Ontario PPSA:

A lessee of goods from a lessor who leases the goods in the ordinary course of business holds the goods, to the extent of the lessee's rights under the lease, free from any security interest therein given by the lessor even though it is perfected and the lessee knows of it, unless the lessee also knew that the lease constituted a breach of the security agreement. [Emphasis added.]

[30] The Trustee argued that the consequence of s. 30(2) is that GE's security interest was "never effective" against Perimeter, even though s. 30(2) does not contain the "not effective" wording of s. 20(b)(i) discussed in Giffen. Counsel submitted that the court should look to the Uniform Commercial Code ("UCC") provisions in respect of personal property security to assist in determining the intention and effect of s. 30(2) to the facts of this case. (The value of the UCC in interpreting personal property legislation has been favourably commented upon by various appellate courts in Canada: see *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)* (1998) 62 Alta. L.R. (3d) 40, 1998 ABCA 154; *Toronto-Dominion Bank v. R.N.G. Group Inc.* (2002) 38 C.B.R. (4th) 110 (Ont. S.C.J.).) In its factum, the Trustee quoted s. 9-320(a) of the UCC, which provides:

Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

The Trustee suggests that this provision of the UCC "operates in the manner that [it] asserts s. 30(2) of the PPSA operates."

[31] As GE notes in its factum, however, Article 9-320(a) of the UCC deals only with buyers in the ordinary course of business, whereas Article 9-321(c) deals with lessees. It provides:

A lessee in the ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence. [Emphasis added.]

Thus counsel for GE submits that the UCC is consistent with the commentary of Cuming, Walsh and Wood, with the Ontario PPSA, with the result reached by the chambers judge in the case at bar, and with the obiter dicta in *Car-Ant*, supra - i.e., that what the lessee (here, the Trustee) takes is Perimeter's leasehold interest in the buses, free of the interest granted by Century to GE. Once the lease has come to an end, that interest is said to be spent and GE is entitled to the benefit of its (perfected) reversionary interest.

[32] In support of this interpretation, GE also submits that if the Trustee in this case were held to be entitled to the buses themselves free of GE's security interest, when Perimeter only bargained for a leasehold interest, the result would be absurd and commercially unreasonable. GE's rights in respect of goods said to have a value of some \$1.4 million would be effectively confiscated. GE points to the Supreme Court of Canada's observation in *Hong Kong Bank of Canada v. Wheeler Holdings Ltd.* [1993] 1 S.C.R. 167, that legislation is to be construed in a manner that least interferes with existing rights unless it expressly provides otherwise. (See pp. 184 and 188-9.)

[33] In my view, nothing in s. 30(2) contemplates or requires that the Trustee acquires title to the buses free of the interest of GE in Century's perfected reversionary interest. It is true that in *Giffen*, the Supreme Court of Canada held that the principle of *nemo dat* has been modified "through the policy choices of the Legislature represented in s. 20(b)(i) of the PPSA". (Para. 56.) But the Court was construing s. 20(b)(i), which on a plain reading made an unperfected security interest of a lessor "ineffective" as against the lessee's trustee in bankruptcy. The Court emphasized that the PPSA does not deal with title but with competing priorities. Here, we have a contest between the trustee of a lessee, and the holder of a perfected security interest granted by the lessor. That holder did what it was required to do by the PPSA to protect its interest. It is not a necessary result of the operation of s. 30(2), in my opinion, that the Trustee acquire ownership of the goods themselves free of the interest granted by Century to GE. Both the policy underlying s. 30(2) and the wording of the section itself require only that the Trustee remain entitled to the bankrupt's interest under the lease, free of all interests described in the section. This ensures that as long as the lease is extant, the lessee's rights will not be affected by the security interest granted by the lessor. The public interest in ensuring that the lessee gets what it bargained for is fulfilled and the Trustee may continue to enjoy the benefit of the lease as long as it is extant. In this regard, I agree with GE's submission at para. 53 of its factum:

As summarised in Cuming above, a buyer of goods takes free and clear of prior security interests pursuant to s. 30(2). This is because a buyer contracts for ownership of the goods being sold, and s. 30(2) ensures that the buyer gets what he or she bargained for. A lessee, however, contracts for temporary use and possession of the goods under the lease. The lessee's interest is given protection under s. 30(2) to the extent of what he or she contracted for. A security interest given by the lessor cannot be asserted against the lessee to the extent of denying the possessory rights of the lessee. However, s. 30(2) does not negate the security interest in the lessor's reversionary interest in the same way that it negates a security interest given by a seller (who has no reversionary interest). The role of this section is to ensure that the lessee's limited possessory rights are not affected by the security interest in the subject-matter of the lease. [Emphasis added.]

(I would, however, note that according to Giffen, the lessee's interest was not only "possessory", but proprietary.)

- [34] We requested and obtained counsel's submissions as to whether the lease granted by Century to Perimeter may still be said to be extant. Mr. McLean on behalf of the Trustee took the opportunity to expand on Giffen, contending that the lease granted by Century was "not effective" against the Trustee, and that since the trustee in Giffen could convey clear title to a third party, "one could only view the lease as having been terminated as at the date of the bankruptcy." With respect, this overlooks the distinctions between Giffen and this case, the difference in wording between s. 20(b)(i) and s. 30(2), and the fact that the PPSA deals not with title to chattels but with priorities between competing proprietary interests. The Court in Giffen 'admitted' that the trustee "end[ed] up with full rights to the car", but implied that that was a particular result reached on the particular facts. It is not mandated in the case at bar, where s. 20(b)(i) has no application and the contest is between a lessee of goods and the holder of a perfected security interest.
- [35] Mr. Robinson on behalf of Century and GE submitted that it can be inferred the Trustee has elected to "surrender, disclaim or resiliate" (this wording is from s. 30(1)(k) of the BIA) the lease, given that the Trustee made none of the payments due under it, failed to perform any of the lessee's other obligations and unconditionally returned the buses to the respondents. The Trustee was entitled to surrender or resile from the lease and, the respondents contend, the fact that the inspectors of the Perimeter estate did not authorize this action is a matter that does not affect the validity of the Trustee's action: see *Re H.O. Kirkham & Co.* [1939] 1 W.W.R. 425 (B.C.S.C.) and cases cited therein, and *Re Plourde* (1979) 31 C.B.R. (N.S.) 308 (Que. C.A.) at 311.
- [36] I agree that the facts of this case clearly support the inference that the lease was brought to an end, at the latest, when the buses were returned to Century at GE's request. That being the case, the operation of s. 30(2) is spent, and in my view, GE is entitled to assert its (perfected) interest against the Trustee. The order of the chambers judge below should stand.

[37] It is unnecessary to deal with the second branch of the appeal since GE was entitled on the surrender of the buses to retain them as against the Trustee - and to permit Century to lease them again.

[38] I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Groberman"

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